IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO.49 OF 2005

Shri Baban Tukaram Nakashe ...Applicant

Versus

The State of Maharashtra ...Respondent

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Ms.Sujatha Jathan i/b Mr.S.R.Pasbola for Applicant.

Mr.V.B.Konde-Deshmukh, A.P.P. for Respondent.

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CORAM: A.M.KHANWILKAR, J.

APRIL 27, 2005.

P.C.

1. Heard Counsel for the parties.

2. Applicant was tried for offence punishable under Section 353 of the Indian Penal Code by the Metropolitan Magistrate, 44th Court, Andheri, Mumbai. After trial, the Magistrate, by order dated 25th August 2003 recorded finding of guilt against the Applicant and convicted him for the offence under Section 353 of the Indian Penal Code

and by the same order, sentenced the Applicant to suffer rigorous imprisonment for three months and to pay fine of Rs.500/- (Rupees Five Hundred), in default, to undergo simple imprisonment for one month.

3. Against this decision, matter was carried in Appeal by the Applicant before the Sessions Court in Criminal Appeal No.210 of 2003. That appeal has been dismissed by the impugned decision dated 4th February 2005. Insofar as finding of guilt returned by two Courts below is concerned, there is no infirmity, either in the approach or the conclusion reached by the Courts below in that behalf.

4. There is evidence on record to indicate the involvement of the Applicant in the commission of the crime. That is the finding of fact returned by two Courts below, which are final fact finding Courts, on appreciation of the evidence on record.

5. This Court, in exercise of the revisional jurisdiction, cannot undertake the exercise of

appreciation of evidence on record, to take a view different than the one taken by the fact finding Court, even if another view on the same evidence was possible.

6. As mentioned earlier, the finding of guilt recorded by two Courts below is unexceptionable. To that extent, the Revision should fail.

7. The question, however, is regarding the sentence imposed by the Courts below. The Trial Court has not addressed itself to the applicability of Section 360 of the Criminal Procedure Code in the present case. This grievance was specifically made before the Appellate Court. The Appellate Court has even adverted to the Supreme Court decision cited on behalf of the Applicant that it is the duty of the Court to invoke Section 360 of the Code, if available, in the fact situation of the given case. However, the Appellate Court proceeded to observe that the said decision was cited only to support the argument that the Magistrate should have applied Section 360 of the Code. This approach of the Appellate Court is, to

say the least, wholly inappropriate. The duty is not only cast upon the Trial Court, but also on the superior Courts to invoke Sections 360 and 361 of the Code, in cases where the same is available to the accused.

8. Be that as it may, while admitting this Revision, I had directed Office to invite report of the Probation Officer. Report of Probation Officer dated 24th March 2005 has been received by this Court. From the report, it appears that the Applicant is presently 44 years of age. He is a married man, having responsibility of three children. He has his own house and is gainfully employed. He has no bad habits. He was not involved in any criminal offence in the past and the present offence is the first offence committed by him of its kind. The report further also records that the Applicant has expressed remorse for having committed the offence.

9. Having regard to the report of the Probation Officer and the offence in question committed by the Applicant is under Section 353 of

the Indian Penal Code, punishable with imprisonment up to two years with fine or with both, in my opinion, applying the benefit of Section 360 of the Code, following order will meet the ends of justice:

> The Revision succeeds to the limited extent. The order of conviction is maintained. But the Applicant is given benefit of Section 360 of the Cr.P.C. It is ordered that the Applicant be released on probation of good conduct instead of straight away requiring the Applicant to undergo the sentence. The Applicant shall enter into a bond with one surety to receive the sentence when called upon during the period of one year and in the meantime, keep peace and be of good behaviour. Bond shall be executed within two weeks from today before the Trial Court.

10. Application disposed of on the above terms.

A.M.KHANWILKAR, J.